IN THE

SUPREME COURT OF THE UNITED STATES

NUMBER 79-690

BOBBY REED MAGBY,

Petitioner,

vs.

JOHN MORAN, Director, Arizona State Department of Corrections, HAROLD CARDWELL, Warden, Arizona State Prison, State of Arizona,

Respondent.

PETITION FOR

WRIT OF CERTIORARI

TO

THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

STANTON BLOOM
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Attorney for Petitioner

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

AUTHORITIES

ARGUMENT I

THE ARIZONA SUPREME COURT, THE UNITED STATES DISTRICT COURT AND THE NINTH CIRCUIT COURT OF APPEALS ERRED IN DECIDING THAT AN APPELLANT'S IN-CUSTODY STATEMENTS MADE TO A PROBATION OFFICER WITHOUT MIRANDA WARNINGS WERE HARMLESS ERROR, AND THEREBY DEPRIVED THE PETITIONER OF DUE PROCESS OF LAW PURSUANT TO THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND DEPRIVED PETITIONER OF HIS RIGHT NOT TO INCRIMINATE HIMSELF PURSUANT TO THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Respondent in his reply has briefly addressed the legal arguments and has simply relied upon Lower Court rulings. However, it is evident Respondent during the entire brief has devoted much time and effort to a discussion of the facts, because the Law is clearly opposed to his position. Petitioner has, in earlier petitions and briefs, emphasized the facts but spent more time on the Law for purposes of this Petition. Petitioner welcomes the opportunity now to respond to the factual, fictional atmosphere portrayed by the Respondent.

Respondent argues Petitioner's statements to the Probation Officer were innocuous. If they were

so innocuous, why did the Prosecutor insist on the statements to be introduced in his case-in-chief? Why is the only statement from the Petitioner that he remembered everything that happened and then supplied details innocuous when the Petitioner, through State's witnesses, raised the "defense" of intoxication, that he did not know what was happening? Why are Petitioner's statements innocuous when he states he knew what he was doing and was unable to properly present a factual self-defense defense when the Petitioner's defenses were also insanity and self-defense, as established by State's witnesses alone? More importantly, other State's witnesses that briefly touched on such statements did not testify to the words of the Petitioner as they touched upon his defenses. Can it be any clearer why the Prosecutor knew he needed the testimony and why such evidence ever introduced before the defense ever presented its case must be declared not to be harmless error?

Significantly, Respondent has attempted to skirt the issue of voluntariness and asked this Court not to rule on this most vital issue. This case is old enough now, and if there is reversible constitutional error, it ought to be dealt with now by this Court, particularly when the question is so ripe for decision.

The Probation Officer Burch stated he wanted to gather information to determine if Petitioner's

probation should be revoked. (RT-V3-483,487). Most importantly, Probation Officer Burch testified on a pre-trial motion "that he considered his position one of an accusatory position and once the Petitioner had been arrested, he considered himself an adversary against the Petitioner." (RT-V3-494,499). Against this background, the Probation Officer candidly admitted that he used his "good rapport with the Petitioner to gain his confidence", and thereby secure the statement later used at trial by the Prosecutor against the Petitioner. (RT-V3-499,500). It is precisely the uniqueness of the confidential relationship that allowed for the elicitation of the statement. This, coupled with the Petitioner's fear of not cooperating, and the possible repercussions listed in the opening petition, clearly called for the Petitioner to make an involuntary statement. Petitioner requests this Honorable Court hold his statements made to the Probation Officer 2 days after his arrest to be made in an involuntary manner and, therefore, never harmless error, and reverse his conviction.

ARGUMENT II

THE ARIZONA SUPREME COURT, THE UNITED STATES DISTRICT COURT AND THE NINTH CIRCUIT COURT OF APPEALS ERRED IN DECIDING THAT PETITIONER'S STATEMENT TO PSYCHIATRISTS IN VIOLATION OF THE ARIZONA RULES OF CRIMINAL

PROCEDURE WERE HARMLESS ERROR, AND THEREBY DEPRIVED PETITIONER OF DUE PROCESS OF LAW IN ACCORDANCE WITH THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND DEPRIVED PETITIONER OF HIS RIGHT NOT TO INCRIMINATE HIMSELF IN ACCORDANCE WITH THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Again Respondent states the statements made to the psychiatrists were cumulative harmless error. In fact, the Prosecutor had learned of much of his information used at trial under the guise he would not use this information with every psychiatric witness, knowing full well by his own admission and avowal that such statements were inadmissible at trial. (C.H. 89-90). (RT-V3-583). In fact, on a pre-trial motion, when the Prosecutor attempted to elicit the confidential information complained of from Dr. Hoogerbeets, the objection was sustained. (RT-V3-520). Further, prejudice occurred when the Prosecutor used the inadmissible statements of the Probation Officer to question the psychiatrists.

The relationship of psychiatrist and patient by its very connotation must produce the openness and trust of the patient to elicit any meaning, observation and commentary. This is particularly true when the Petitioner-Examinee-Patient is

ordered by the Court to speak to the doctors lest he be penalized for not doing so and lose his defense and/or witness and subject himself to further incarceration for contempt of Court. Arizona Rules of Criminal Procedure, Rule 11.2. Petitioner requests that this Court hold his statements to be reversible error as a violation of due process and as involuntary statements violating his Fifth Amendment rights to the United States Constitution.

ARGUMENT III

THE ARIZONA SUPREME COURT, THE UNITED STATES DISTRICT COURT AND THE NINTH CIRCUIT COURT OF APPEALS ERRED IN DECIDING THAT A PSYCHIATRIST APPOINTED TO EXAMINE PETITIONER SOLELY FOR COMPETENCY COULD TESTIFY AT TRIAL AS TO THE SANITY OF PETITIONER AT THE TIME OF THE OFFENSE, AND THEREBY DEPRIVED PETITIONER OF A FAIR TRIAL AND DUE PROCESS OF LAW IN ACCORDANCE WITH THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Respondent is incorrect when he stated "Petitioner makes no claim that there was no basis for the opinion." On P.26 of the opening petition, Petitioner states "Petitioner also claims the psychiatrists had no basis to form an opinion...."

Petitioner does not feel that the psychiatrist, Dr. Hoogerbeets, was in a proper position to make a determination of the Petitioner's sanity at the time of the offense.

The psychiatrists (not Dr. Hoogerbeets) at the time of the first competency hearing and mental examination were specifically appointed to examine the Petitioner for sanity. (2-15-74, P.13) Dr. Hoogerbeets was not requested to conduct such an examination, and, in fact, was specifically instructed not to conduct an examination on the sanity of the Petitioner. The Trial Court stated on a pre-trial motion, when the Prosecutor attempted to bring out evidence on the issue of sanity, "You were not asked to delve into that and no one intended that be gone into." (RT-V3-559). The fact the Petitioner's trial counsel was able to pretrial interview Dr. Hoogerbeets does not have any bearing or relevance on the propriety of Dr. Hoogerbeets examination for sanity and his testimony thereto. The interview does not save an illegal procedural and substantive act. The fact that the defense knows Dr. Hoogerbeets did something improper and is going to try and compound the impropriety by testimony at trial does not somehow cure any error. The Doctor's examination testimony and subsequent opinion cannot be based or predicated on an issue that was not the reason for his examination of the Petitioner and for which

the Petitioner was unprepared and unaware. Petitioner humbly suggests that these statements to the psychiatrists were admitted into evidence as a violation of the Petitioner's rights to due process of Law and not to incriminate himself in accordance with the Fourteenth Amendment and Fifth Amendment of the United States Constitution.

ARGUMENT IV

THE ARIZONA SUPREME COURT, THE UNITED STATES DISTRICT COURT AND THE NINTH CIRCUIT COURT OF APPEALS ERRED IN DECIDING PETITIONER'S CONFESSIONS AND STATEMENTS TO POLICE OFFICERS AND LAY WITNESSES WERE KNOWINGLY AND VOLUNTARILY MADE, EVEN THOUGH PETITIONER WAS HIGHLY INTOXICATED, AND THEREBY DEPRIVED PETITIONER OF HIS RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The facts show the statements to the police and his girlfriend were far from being spontaneous declarations made with rational intellect and free will, but on the contrary, were involuntary statements made while the Petitioner was highly intoxicated.

Petitioner had been drinking for months continuously up to the day of the shooting, but prior to the shooting, Petitioner had been drinking

heavily without dispute. (RT-V6-1064). Larsen, a State's witness and friend of the deceased, stated Petitioner, in the morning shortly before the shooting, was "under the influence", "had a slur in his voice", "was stumbling", and "was plastered". (RT-V1-93,94,119). Larsen further stated Petitioner "was pretty well plastered", "staggering quite a bit", "slurring his words" and "was on the verge of passing out". (RT-V4-674,675). Earlier, when Larsen had tasted the contents of the jug Petitioner was drinking from, he stated the substance therein was "potent stuff", and it was "mixed hard". (RT-V4-715,716). Larsen, in addition, stated right before the shooting, but right after the deceased and the Petitioner had had a fight, Petitioner was "pretty well gone drunk", "pretty wiped-out", (RT-V4-731) and "looked drunk" (RT-V4-733,739,741) and "was drunk" (RT-V4-674,770).

The next witness was Siegfried, who was a friend of Petitioner's. Larsen and Siegfried had both witnessed the fight between the deceased and the Petitioner shortly before the shooting and saw Petitioner on the ground in an unconscious state. (RT-V1-86, RT-V4-666,725, RT-V6-1083,1084,1183, 1184-1187). Siegfried testified the Petitioner before the shooting "was out of it at the time of the scuffle," (RT-V6-1095) and "was drunk". (RT-V6-1094,1180). Siegfried testified that Petitioner had a blank look on his face and was unable to stand

before the shooting (RT-V6-1133,1257). Further, he stated Petitioner had trouble talking and was barely understandable and at the time of the shooting was in a dazed condition acting real strange. (RT-V6-1206,1273). Ralph Vogler, an eye-witness to the shooting who arrived after the fight but a minute or two before the shooting stated Petitioner was stumbling around (RT-V5-885) and he could hardly walk (RT-V5-895,898). Vogler thought the Petitioner was "high on something" (RT-V5-928) or that he "was loaded." (RT-V5-929).

A mailman saw the Petitioner shortly after the shooting stumbling out in the desert where he appeared physically exhausted or possibly intoxicated. (RT-V7-1403,1407). Petitioner passed out in a nearby truck where he was found by the owner slumped over the seat. The police found Petitioner in a similar position and then transported him back to the scene for identificaiton. Petitioner was slumped over in the squad car and was exhibited to the witnesses by having his head pulled up by his hair by the police. (RT-V1-112, RT-V4-682).

Petitioner was then transported to the hospital to treat his physical condition. The doctor that examined Petitioner stated he noticed a strong odor of alcohol about him and upon testing found "no reflexes were exhibited at all." The nurse who tended the Petitioner at the hospital

Emergency Room, testified Petitioner was staggering, had a blank stare on his face, and looked like he had been out in the desert a few days. She further stated that he was "spaced-out", "bewildered, wild-eyed, glassy-eyed, and his eyes were rolling back and forth." (RT-V8-1433,1440,1454). In addition, she stated Petitioner needed assistance to get on the stretcher and to get his clothes off for the doctor's examination. (RT-V8-1432,1433).

Petitioner's girlfriend, whom he spoke to on the telephone after he was taken to the jail stated the Petitioner did not sound like he was into the conversation and sounded out of breath. (RT-V8-1489)(RT-V2-257,260). At the time of this telephone conversation, the trial Judge referred to Petitioner's intoxication. (RT-V1-200).

Many police officers saw the Petitioner after the shooting. Deputy Godfrey saw Petitioner 1 1/2 hours after the shooting and said he was "under the influence of intoxicating beverages, staggering a bit, had slurred speech, smelled of alcohol, had bloodshot red eyes, dusty clothes, and was pretty messed-up." (RT-V8-1563,1569,1575,1584). Sergeant Jett stated Petitioner was under the influence of alchoholic beverages but would be unable to give an opinion on the degree of intoxication. (RT-V1-163). Sergeant Tucker, however, stated Petitioner, several hours after being arrested, was still definitely under the influence of alcohol and

quite intoxicated. (RT-11-19-74, pp.148-149). Sergeant Tucker related that Petitioner did not speak clearly, swayed when he walked, talked slowly and slurred his words, had red glassy eyes, a very cocky mood and was just sort of wandering around swinging his arms and talking very loudly. (RT-V3-424,425,433). The male police nurse that drew Petitioner's blood at the jail indicated Petitioner was drunk, had bloodshot eyes, was staggering, a little incoherent and, in his opinion, the Petitioner "was drunk", "he looked drunk and he just looked drunk to [him], that's all". (RT-V9-1609,1610).

The Prosecutor, in his closing argument, told the Jury Petitioner "had been drinking a great deal", "was drunk as anything" and was "pretty drunk" (RT-V4-614-617) and pretty wiped-out. (RT-V4-731). On a motion for a new trial, the Trial Judge reiterated his early feeling that the Petitioner had been "highly intoxicated". (Motion - New Trial, p.20).

It is highly difficult to perceive that after the Petitioner had been beaten at the hands and feet of the deceased, beaten by the police at the time of his arrest, taken to the Emergency Room at a local hospital and was in the drunken state as attested to by every single witness produced by the Prosecution, including those testifying to the Petitioner's blood alcohol (.36-.40), that

Petitioner's statements can be held to be anything but involuntary and not made with rational intellect and free will.

ARGUMENT V

THE ARIZONA SUPREME COURT, THE UNITED STATES DISTRICT COURT AND THE NINTH CIRCUIT COURT OF APPEALS ERRED IN DECIDING THE EVIDENCE SUPPORTED CONVICTIONS FOR FIRST AND SECOND DEGREE MURDER, AND DEPRIVED APPELLANT OF THE JUDICIAL GUIDANCE TO WHICH HE WAS ENTITLED FROM THE TRIAL COURT AND THEREBY VIOLATED PETITIONER'S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. MALICE.

Petitioner reasserts his comments in his opening petition.

B. INTOXICATION--SELF-DEFENSE.

It is clear that the deceased kicked Petitioner in the ribs after knocking him to the ground and threatened "he was going to tear his little ass apart." (RT-V4-724). Petitioner was knocked down pretty good (RT-V4-727) and was unable to get up under his own power. The deceased was well-developed, big, strong, muscular, tough and a karate expert. (RT-V4-702, RT-V6-1189,1202). The

deceased had been in the penitentiary (RT-V4-702), and had a reputation for turbulence and violence, and was considered a fighter and pretty tough, as corroborated by the Pima County Sheriff's Office (RT-V7-1355) and several lay witnesses. (RT-V4-703,704)(RT-V6-1191). These facts, coupled with the intoxication argument of ARGUMENT IV, truly support the basis of a conviction other than first-degree murder. Petitioner asks this Court to properly and rationally review the facts and asserts this Court can come to no other logical conclusion. Mr. Justice Harlan stated in In Re Winship, 397 U.S. 372, 90 S.Ct. 1068, 25 L.Ed.2d. 368 (1970)

> "It is far worse to sentence one guilty of only manslaughter as a murderer, than to sentence a murderer for the lesser crime of manslaughter."

C. MITIGATION INSTRUCTION

1. Lack of Malice.
2. Shift of Burden of Proof.

The instructions complained of and likened to Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d. 508 (1975),have not passed Constitutional muster and could never do so in their present condition.

ARGUMENT VI

THE ARIZONA SUPREME COURT, THE UNITED STATES DISTRICT COURT AND THE NINTH

CIRCUIT COURT OF APPEALS ERRED IN DECIDING THAT AN INSTRUCTION STATING, "THERE IS NO PRESCRIBED PERIOD OF TIME WHICH MUST ELAPSE BETWEEN THE FORMATION OF THE INTENT TO KILL AND THE ACT OF KILLING" WAS PROPER, AND DEPRIVED THE PETITIONER OF THE JUDICIAL GUIDANCE TO WHICH HE WAS ENTITLED FROM THE TRIAL COURT AND THEREBY VIOLATED HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THF UNITED STATES CONSTITUTION.

In viewing the complained of instruction, one must consider what the Jury could possibly conceive from the instruction that would misguide them and find facts not in accordance with the Law. In the case at bar, if the Jury believed that Petitioner had left the van and gone out to the deceased to only scare him, as was testified by Dr. Hoogerbeets, a psychiatrist-witness for the State (RT-V11-2122) and then when the deceased, according to Vogler, a State's witness, (RT-V5-914), walked towards Petitioner, and Petitioner formed the specific intent to kill the deceased at approximately the same time he fired the gun, the Petitioner would then, under the complained of instruction, be guilty of first-degree murder. The improper instantaneous-successive thought theory would prevail, and, therefore, every killing

would automatically be first-degree murder. This instruction is clearly bad law and must be struck down before more Petitioners are convicted of first-degree murder when their crimes are of a considerably lesser degree as particularly in the case at bar. Petitioner requests this Honorable Court to reverse his case because the Jury was deprived of proper judicial guidance and due process of Law when it was given the complained of instruction, or in the alternative, reduce the conviction to a crime palatable with the evidence.

Stanton Bloom

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AFFIDAVIT OF SERVICE

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

STANTON BLOOM, being first duly sworn deposes and says:

That in accordance with Rule 33(2)(a), Supreme Court Rules, he has served a copy of the following documents on the Attorney General, State of Arizona, 200 State Capital Building, Phoenix, Arizona 85007, and has forwarded by mail, a copy of the following documents to the Solicitor General, Department of Justice, Washington, D.C. on this 17th day of December, 1979:

PETITION FOR WRIT OF CERTIORARI

PETITIONER'S REPLY BRIEF

Stanton Bloom
STANTON BLOOM

SUBSCRIBED AND SWORN to before me this 17th day of December, 1979, by STANTON BLOOM.

Linda D. Kovarr
NOTARY PUBLIC

My commission expires:

My Commission Expires Nov. 15, 1983